93-846

NO.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1993

JESSE D. WALLIN SR.,

Petitioner,

versus

INDETERMINATE SENTENCE REVIEW BOARD; and the DEPARTMENT OF CORRECTIONS FOR THE STATE OF WASHINGTON,

Respondent.

Petition for Writ of Certiorari
to the United States Court of Appeals
For the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the District Court erred in dismissing the Petitioner's Habeas Corpus petition?

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONER, JESSE D. WALLIN, SR., by and through his counsel, JULIO MORLEY, prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Ninth Circuit entered March 23, 1993.

I.

OPINION BELOW

The United States Court of Appeals for the Ninth Circuit issued an unpublished opinion filed on March 23, 1993, affirming the District Court's denial of petitioner's Habeas Corpus and subsequent motion, attached hereto as Appendix A. The Report and Recommendation of United States magistrate and District Court's

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Order affirming same is attached as Appendix B. Order denying motion to Reconsider Dismissal is appended as Appendix C.-

II.

JURISDICTION

The jurisdiction of this court is invoked pursuant to 62 Stat. 928, 28 U.S.C.A. f1254(1). The date of MEMORANDUM OPINION of the United States Court of Appeals for the Ninth Circuit was March 23, 1993. An extension to file Writ of Certiorari was granted by the Honorable Sandra Day O'Connor on June 14, 1993, granting an extension to file until August 20, 1993.

III.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the 14th Amendment to the Constitution of the United States. See App.F.

IV.

STATEMENT OF THE CASE

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A. FACTS RELEVANT TO ISSUE ON APPEAL

In 1980 Jesse D. Wallin, Sr., was tried and convicted in State court on Assault 2nd Degree, one count, and 2nd Degree Statutory Rape as an accomplice on count 2.

Mr. Wallin presented a Writ of Mandamas on September 23, 1988 (See appendix D, page 1a)

Franklin D. Burgess, United States Magistrate denied petitioner's motion for Habeas Corpus on August 16, 1990, (See Appendix D, page 5).

Petitioner appeals from the final order denying requested relief (See Appendix D, page 5).

B. DISPOSITION IN THE COURT BELOW

On September 23, 1988 Mr. Wallin filed his Writ of Mandamas requesting relief from the decision of the Superior Court which sentenced him to consecutive 10 year terms

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for one count of Second Degree assault and one count of Second Degree Statutory Rape.

The Indeterminate Sentence Review Board later changed the sentences to run concurrently. Mr. Wallin's appeal stated that both his conviction and sentencing were unconstitutional.

V.

STANDARD OF REVIEW

Relief requested under the Federal Habeas Corpus Statute is based on 28 U.S.C.§ 2254. The standard of review must, therefore be, abuse of discretion.

VI.

ARGUMENT

28 U.S.C.A. § 2254 provided in part:

> (d) In any proceeding instituted in a Federal Court by an application for a Writ of Habeas Corpus by a person in custody pursuant to judgment of a State

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Court, a determination after a hearing on the merits of a factual issue, made by a State Court of competent jurisdiction in a proceeding to which the applicant for the Writ and the State or an officer or agent thereof were parties, evidenced by a written finding, writtin opinion, or other reliable and adequate written indicia, shall be presumed to be correct unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit:

(1) that the merits of the factual dispute were not resolved in the State Court hearing;

(2) that the applicant was otherwise denied due process of law in the State Court hearing;

28 U.S.C.A. § 2254(d)(1)(7)

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The Court below, in the magistrate's ruling, as accepted by the District Court, found no necessity for an evidentiary hearing to resolve the applicant's various assertion's of error. (See Appendix D, page 5).

The U.S. Supreme Court in Townsend v. Sain, 372 U.S. 292 (1962), the court said:

"We hold that a federal court must grant an evidentiary hearing to a habeas applicant under the following circumstances: If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state federal determination is not fairly supported by the record as a whole; (3) the factfinding procedure employed by the state was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at

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the state-court or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing. Townsend at p. 313.

It would seem from a clear reading of the Magistrate's Report at pg. 8, line 7, that he adopted the Petitioner's verbatim account of the alleged conspiracy against him, without the formal basis of the trial transcript.

Under the Townsend test (3) Supra, it would appear that the Magistrate did not have the full transcript of trial to make an adequate determination.

In fact quoting the magistrate's report, in part: "The Petitioner's wide - reaching allegations of conspiracy, bribery and perjury, if true, would likely entitle him to relief. (See Appendix B, Magistrate Report, pg. 8, line 9.)

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It would seem, from a careful reading of the magistrate's Report that he discounted the petitioner's allegation, ex-officio, without the benefit of any other record except the petitioner's writ, and the state's response, either of which without evidence is heresay.

The test in Townsend (Supra) was cited also in a Ninth Circuit decision, Founts v. PoGue, 532 F.2d 1232 (1976), which identified the Townsend criteria for determining the need for an evidentiary hearing. Founts (Supra) at pg. 1234.

In a Fifth Circuit decision, Hollingshead v. Wainwright, 423 F. 2d 1059 (1970), the Court stated:

> "If the petitioner's allegation taken as true (as they must be) assert a Constitutional violation, a hearing is required. Hollingshead at pg. 1060.

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In the Magistrate's opinion, he discussed the validity of the petitioner's claims as asserted, but (my emphasis) discarded them as false. Clearly the issues of conspiracy, bribery and perjury all of which taken together formed part of the basis for petitioner's ultimate conviction and loss of liberty surely form some kind of basis for a constitutional challenge. (See Appendix B, Magistrate's Report, pgs. 8-10).

In a Ninth Circuit decision, Fritz v. Spalding, 682 F.2d 782 (1982), the court said:

> "If, however, the material facts were not adequately developed in state court, or the state-court hearing was otherwise deficient, no deference is warranted, 28 U.S.C. 2254 (d)(3) & 2254 (d)(6), and the petitioner is entitled to an evidentiary hearing in Federal Court. Townsend, 372 U.S. at 317-18, 83 S.Ct at 759-60. Fritz at pg. 785.

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In the case before this court petitioner laid claim to three areas of prejudice as to his decision, (1) conspiracy, (2) bribery and (3) perjury.

In support, Petition relies on the recanting affidavit of his son Jesse D. Wallin, Jr., who stated that his testimony was coached, drilled and prepared at the time of his father's trial. Further, the affidavit of Dorothy L. McCracken, dated September 17, 1990, contradicts evidence introduced at the time of trial. (See Appendix F, affidavits of Wallin & McCracken). Notwithstanding the request for reconsideration made by the petitioner, the court below, denied reconsideration.

In a Sixth Circuit decision, Martin v. Fontz, 773, F.2d 711 (1985) the court noted:

> "The district court's opinion is incorrect on this point. First, State Court's findings of fact are not binding, but are

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entitled only to a presumpting correctness under 28 U.S.C. § 2254 (d). See Sumner v. Mata, 455 U.S. 591, 597, 102 S. Ct. 1303, 130 8, 71 Ed. 2d 480 (1982) (Sumner II) ("the federal courts are not necessarily bound by the state court's findings"). Martin, Supra, at pg. 716.

Error rises, in this case because the magistrate relied on only imputed evidence with no factual evidence to further bolster his opinion. In his report, the magistrate stated:

> "This Magistrate must find that the petitioner's allegation of coercion, bribery and perjury are indeed speculative, inconcrete and palpably incredible. (See Appendix B, Magistrate's Report, pg. 10, lines 1-3.)

What the magistrate is saying is that he just does not believe petitoner's claim, however, such belief must (my emphasis) be

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rooted in some type of evidentiary basis., ie, hearing!

In an Eighth Circuit case, UNITED STATES ex Rel. MEANS v. Solem, 646 F. 2d 322 (1980), the court said:

> "The general rule is that only issues of constitutional magnitude are cognizable in Habeas Corpus. The claim must allege a "fundamental defect which inherently results in a complete miscarriage of justice (or) an omission inconsistent with the rudimentary demands of fair procedure". In order to be considered on a petition for a Writ of Habeas Corpus. Hill v. United States, 368 U.S. 424, 428 (1962) MEANS (Supra) at pg. 332.

It is the contention of petitioner that denial of a hearing to test the validity of his claims is a fundamental defect which denies

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him due process of law and is also inconsistent with the rudimentary demands of fair procedure.

In a Ninth Circuit case, McHenry v. Wilson, 403 F.2d 711 (1968), the court said:

> "The record reflects that Appellant alleges facts outside the record of the State Court proceedings, which, if true, would entitle him to the relief sought. McHenry (Supra) at pg. 711.

Appellant/petitioner alleges those new facts cited in the accompanying record and maintains that denial of an evidentiary hearing is a denial of due process of law.

While a determinative test was offered in the Townsend court, (Supra), it is painfully evident that the circuit courts, are not in unison, as to the Townsend, (Supra), criteria.

By using Townsend, (Supra), as a guide, the court might fashion a more comprehensive

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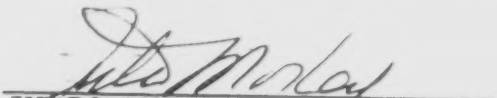
basis for granting an evidentiary hearing. For example, evidence not consistant with the State's court's scrutiny, and using other later decisions, and perhaps those of the circuits to develope a comprehensive test would be most valuable in the area of Habeas Corpus, since this area of criminal law has an abundance of appeable issues.

VII.

CONCLUSION

The District's Courts denial of an evidentiary hearing in effect is a denial of petitoner's due process of law rights made applicable by the United States Constitution, and the Bill of Rights.

Respectfully Submitted



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APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JESSE D. WALLIN, SR., Petitioner-Appellant, v. INDETERMINATE SENTENCE REVIEW BOARD: and THE DEPARTMENT OF CORRECTIONS FOR THE STATE OF WASHINGTON, Respondent-Appellees,	NO. 91-35167 D.C. No.: CV-88-00479-RJB MEMORANDUM*

Appeal from the United States District Court
for the Western District of Washington
Robert J. Bryan, District Judge, Presiding

Argued and Submitted March 5, 1993
Seattle, Washington

Before: CANBY and REINHARDT, Circuit Judges, ant TASHIMA, *** District Judge

Wallin appeals the judgment denying his petition for a writ of habeas corpus and the denial of his "motion to reconsider" that judgment. We affirm.

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* This disposition is not appropriate for publicaiton and may not be cited to or by the Courts of this Circuit except as provided by Ninth Circuit Rule 36-3.

***Honorable A. Wallace Tashima, United States District Judge for the Central District of California, sitting by designation.

I. The Judgment

Wallin did not timely appeal the district court judgment. Wallin filed his notice of appeal 79 days after the judgment was handed down by the district court. A notice of appeal must be filed withing 30 days of the entry of judgment, although this period may be extended upon meritorious motion filed not later than 30 days after the expiration of the original 30 day time period. Fed. R. App. P. 4(a)(5). Wallin did not move for an extension of time in which to notice an appeal. Even if he had filed such a motion, the maximum permissible time in which to file a notice of appeal is 70 days, and would not have encompassed the 79 day delay in this case. See id. (permitting a 10 day extension as late as thirty days after the expiration of the original 30 day period). A timely notice of appeal is mandatory and jurisdictional. Maunden v. Ultra-Alaska Associates, 849 F. 2d 383, 386 (9th Cir. 1988). Consequently, we are barred from reviewing the judgment denying habeas relief.

Although the deadline for filing a notice of appeal is tolled by the filing of a timely Rule 59(e) motion, Wallin's "Motion for Reconsideration" does not constitute a timely motion under that rule. The motion was filed 16 working days (23 total days) after the judgment was rendered. Rule 59(e) motions must be filed within 10 working days of the entry of the judgment. Fed. R. Civ. P. 59(b).

The appeal from the judgment is DISMISSED for lack of jurisdiction.

II. "The Denial of the "Motion for Reconsideration"

This court has jurisdiction to review the denial of Wallin's "Motion for Reconsideration" if the motion is construed as one brought under Fed. R. Civ. P. 60(b). Rule 60(b) allows the court to relieve a party from a final judgment if the moving party discovers new evidence which could not have been discovered in time to move for a new trial under 59(e). A rule 60(b) motion may be filed up to one year after a judgment. See Nevitt v. United States, 886 F.2d 1187, 1188 (9th Cir. 1989).

The new evidence introduced by Wallin to support his Rule 60(b) motion consists of two affidavits. Neither affidavit contains "new evidence" of the type cognizable in a 60(b) motion. Both affidavits were dated prior to the final judgment. Since the affidavits could have been submitted in a timely Rule 59(e) motion, they cannot be considered under a 60(b) motion. See Adams v. Johns-Manville Corp., 879 F. 2d 702, 706 n.2 (9th Cir. 1989).[1/]

The district court did not abuse it discretion in denying the "Motion for Reconsideration." We AFFIRM the denial of the motion.

1/ Even had the new affidavits been submitted in time, our review of the record pursuades us that they would not have provided a basis for the award of habeas relief.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

JESSE D. WALLIN SR., Petitioner,	)	NO. C88-479TB
vs.	)	REPORT AND RECOMMEND-ATION OF UNITED STATES MAGISTRATE
INDETERMINATE SENTENCE REVIEW BOARD, et al., Respondent.	)	

This matter has been referred to Magistrate Franklin D. Burgess pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Magistrates' Rule MR4. This matter comes before the court upon a number of motions.[1]

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[1]Outstanding motions include: petitioner's Motions to Exceed page Limitation, to Withdraw Motion for Continuance and to Proceed with Habeas petition, for Order and Certification of Complete Transcript, to Supplement Response, for Restraining Order and Show Cause, and to Continue. Each of these have been rendered moot in the course of proceedings. The petition's Motion for Reconsideration will be rendered moot based upon the analysis contained in this Report; the petitioner's Motion for Reconsideration will be rendered moot based upon the analysis contained in this Report; the petitioner's Motion for Summary Judgment as to Ground 1 and the respondent's Motion to Dismiss will be expressly considered within this Report.

The petitioner had initially presented but one issue; the respondent submitted its briefing and this Magistrate recommended dismissal of the claim. Before the District Court was able to rule on this recommendation, the petitioner presented additional issues for review. The petitioner's first issue was dismissed, and the petitioner sought reconsideration. In the current stance of this action, the respondent has moved for dismissal of the remainder of the petitioner's issues, and has presented additional briefing in opposition to reinstatement of the first issue. Thus, all of the petitioner's claims[2] are now ready for final resolution, and this Magistrate will now deal with all the issues in the normal manner.

The respondent waives any issue of exhaustion.

The petitioner, currently an inmate at the Washington State Penitentiary, seeks federal habeas corpus relief (28 U.S.C. § 2254)

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[2]It is noted that the petitioner has without leave of court, filed a "Supplemental Writ of Habeas Corpus, Naming Defendants and

from alleged violation of his constitution rights in his 1980 conviction and sentencing for Second Degree Assault and Second Degree Statutory Rape. He was sentenced to consecutive maximum terms of ten years; the Indeterminate Sentence Review Board later determined that these should be run concurrently. He charges that both his conviction and his sentencing were unconstitutional.

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2 (cont.) Cause of Action." This document is clearly intended to serve as a civil rights petition; among other forms of relief requested, the petition asks for damages. The "Supplemental Writ" generally contains similar claims to those considered in this Report, but presents many additional factual allegations that have clearly not been exhausted in the state courts. The petitioner would obviously like to have resolved in this action all his grievances against both state and private actors, but a habeas proceeding is not the appropriate place for such civil claims. This Magistrate will therefore disregard the "Supplemental Writ"; the petitioner may chose to refile this document as a separate civil rights or state tort action.

The petitioner's Second Degree Assault count was based upon his allegedly forcing his wife to insert a soft drink bottle into her vagina, then forcing his open hand into her vagina, causing grievous bodily harm; the Second Degree Statutory Rape count was based upon his allegedly forcing his wife to have intercourse with the petitioner's 13-year old son. As to his conviction, the petitioner contends (1) that his equal protection and double jeopardy rights were violated in that the prosecution was allowed to amend count 2 of the Information after discharge of the jury; (2) that the prosecutor knowingly presented testimony of witnesses who were bribed and other witnesses who had conspired to secure the conviction of the petitioner in violation of his due process rights; (3) that the prosecution withheld from both the petitioner and the jury various agreements with the main complaining witness Sandra Wallin (now Gourdin) immunizing her from prosecution, and led her into giving false testimony; (4) that the

petitioner's trial lawyer rendered ineffective assistance of counsel in that he (a) did not attempt to present evidence of the conspiracy and bribery of witnesses, (b) failed to produce witnesses who would have vindicated the petitioner, (c) failed to present evidence that the petitioner's wife poisoned and/or drugged the petitonier before, during and after the alleged crimes were committed, (d) forced the petitioner to represent himself; and adds a separate ground (e) that his lawyer's failure to submit a "Statement on Appeal" deprived him of the opportunity to review the full transcript of all proceedings, and thus violated his due process rights; (5) that the trial judge issued an unconstitutional instruction on the element of knowledge, and failed to give proper intent an cautionary instructions applicable to accomplices (thus allowing the prosecution to secure conviction without proving intent); and (6) that Washington's Indeterminate Sentence Review Board (a) un-

constitutionally refused to apply Washington's Sentencing Reform Act (SRA), (b) failed to inform the petitioner of the factors it would rely upon in issuing its excessive sentence, (c) failed to preserve a transcript of the sentencing hearing, (d) miscomputed the petitioner's offender's score, and (e) did not provide sufficient notice of its intention to impose an excessive sentence. Almost as an afterthought, the petitioner also argues (f) that the sentence is unconstitutionally vague.

ANALYSIS

"State prisoners are entitled to relief only upon proving that their detention violates the fundamental liberties of the person, safeguarded against state action by the Federal Constitution." Townsend v. Sain, 372 U.S. 293, 312, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963); Bashor v. Risley, 730 F.2d 1228, 1232 (9th Cir.), cert. denied, 469 U.S. 838, 105 S.Ct. 137, 83 L.Ed.2d 77; Miller v. Stagner 757 F.2d 1090 (9th Cir. 1985).

(1) Amendement of Information

Count 2 of the Information was amended on May 2, 1980. It is evident from the date of the Order amending the Information that the amendment succeeded the jury's verdict. As initially filed, Count 2 cited "RCW 9A.44.210", a non-existent section. This mis-citation was apparently not noticed until after the trial, and the Information was amended to cite RCW 9A.44.080.

This identical situation was presented in Malone v.Crouse, 380 F.2d 741, 746 (10th Cir) cert denied, 390 U.S. 968, 88 S.Ct. 1082, 19 L.Ed.2d 1174 (1967). So long as the language of the Information reflected the appropriate statute, as was the case here, habeas relief is not appropriate. Id.

(2) & (3) Witness Testimony

While a conviction based in part upon false or perjured testimony is not generally enought, in itself, to justify habeas relief (Graham v. Wilson, 828 F.2d 656 659 (10th Cir. 1987), a conviction obtained by the prosecution's

knowing use of perjured testimony is deprivation of due process. Mooney v. Holohan, 294 U.S. 103, 112, 55 S.Ct. 340, 79 L.Ed. 791 (1935). In such a case, the conviction must be reversed if "there is any likelihood that the false testimony could have affected the judgment of the jury." United States v. Agurs, 427 U.S. 97, 103,96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). Thus, the petitioner must show that the testimony was false, that it was material, and that it was knowingly and intentionally used by the government to obtain the conviction. McBride v. United States, 446 F. 2d 229, 232 (10th Cir. 1971); Smith v. Oklahoma, 418 F. Supp. 907, 908 (W.D.Ok. 1976). Moreover, a mere inconsistency in the testimony does not establish a prima facie showing of perjury. United States v. Anderson, 481 F. 2d 685, 702 (4th Cir. 1973), aff'd, 417 U.S. 211, 94 S.Ct. 2253, 41 L.Ed.2d 20 (1974); White v. South Carolina, 708 F.Supp. 1465, 1475 (D.S.C. 1988).

The petitioner relates the following

(quoted at length and without correction):

> (1) Petitioner's Wife Sandra L wallin, made Phone Call to Jackson Wyoming to Kathleen M. Mitchell[3], on approximatly December 1979, and inbetween January 22, 1980, to come to the State of Washington and for Kathleen M. Mitchell to give supporting testimony about crimes of Assault and Rape against Petitioner, upon which Kathleen M. Mitchell would receive Petitioner's Children. (2) Sandra L. Wallin on January 16, 1980, Received prescription drugs from Mr. and Mrs. Charls and Mary J. Zickefoose[4] who dispensed said drug without a licence, and directed administering same without Doctors instructions and orders, Which Sandra L. Wallin administered, that the Zickefooses went to the Petitioner's home at E.18921, Sprague, Greenacker's Washington, Petitioner's home and delivered said druge where they new they were not welcome. (3) Following Petitioner becoming poisond by his wife who administered excessive amounts of drugs to Petitioner resulting in Petitioner' hospitalization and his suffering from drug toxicoma, Sandra L. Wallin, Charls F. Zickefoose, Mary J. Zickefoose, Ritcherd Aitken and barbera Aitken, went to the Spokane City-County Police Department on February 4, 1980, and filed Criminal Charges against Petitioner accusing Petitioner of Assault and Rape. And swor to the same as being true. In same Statement Sandra L. Wallin confessed she had Sex With Petitioner's son naming the Pet-

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[3]Ms. Mitchell is the petitioner's first (?) wife, the mother of Jesse Wallin Jr.

[4]Mrs. Zickefoose is the petitioner's elder half-sister.

itioner as a accomplice, to her confessed and alleged sex act of Rape of Petitioner's Son Jesse Jr. on the dates of 11, 12, 13, January 1980, claiming she was forsed. (4) On January 28, 1980, Kathleen M. Mitchell arrived in Spokane, Washington after having drove from Jackson Wyoming, Arrived in Spokane Washington on the date of the 28, January, 1980, went directly to the Zickefooses residence at N. 4325 Lillion Rd., and there remaind with her husband Ben F. Mitchell, during which time did conspire with the Cickefooses and Sandra L. wallin and tha Aitken's as to the charges that would be filed and the testimony they would give. And it was agreed between them that for giving said the Mitchell's would get the Petitioner's childre. Remaind at the Zickefooses residence tell time of trial, following having gave said testimony, the Mitchells took Petitioner's children accross state lines to Wyoming and once there Mr. Mitchell comminsed Raping Petitioner's childre. (5) The Spokane City-County Prosecuting Attorney Peter S. Schweda, Deputy Prosecuting Attonrey, with Petitioner's Attorney joind togather in a conspirice to insure payment of Petitioner's children to the mitchells, and conspired with each other to conceal the true facts that Petitioner was poisond by his wife with the assistence of the Zickefooses who provided the toxice drugs', distorted the facts, and sought to conceal the fact the the mitchell's excepted and received bribery to give testimony and to fabrecate criminal charges against Petitioner. That in the furtherence of this same conspiricy and gross misconduct of publice employees, and

> counsel, the Prosecuting attorney in the furtherence of his actions and role in the conspiricy to gain a conviction of Petitioner, and acquised in knowing testimony to be perjured and false and inconsistent, Suppressed the fact of said agreement under grant of immunity which Perjured testimony was acquised.

Petitioner's Brief in Support of Writ (dated 3/20/89).

The petitioner's wide-reaching allegations of conspiracy,bribery and perjury, if true, would likely entitle him to relief. Under the usual test, then, the petitioner would seem to be entitled to an evidentiary hearing at which he could seek to prove his version of the facts. See, Harris v. Pulley, 692 F.2d 724, 729 (8th Cir.), cert. denied 454 U.S. 872, 102 S.Ct. 345, 70 L.Ed.2d 178 (1981) (an evidentiary hearing is appropriate where the petitioner (1) has alleged facts which, if proved, would merit relief, and (2) had demonstrated that an evidentiary hearing is necessary to establish the truth of the allegations).

The respondent, unfortunately, does not address the need for an evidentiary hearing in

this case. This Magistrate's independent research indicates that an evidentiary hearing is not required in all cases wherein "facts are in dispute":

"To receive a federal evidentiary hearing, the habeas corpus petitioner must allege facts that, if proved, would entitle him to relief. The court need not 'blindly accept speculative and inconcrete claims' as the basis upon which to order a hearing." Lavernia v. Blackburn, 653 F.2d 942, 947 (5th Cir. 1981), cert. denied, 456 U.S. 950, 102 S.Ct. 2021, 72 L.Ed.2d 475 (1982). "There is no requirement of a hearing where the claim is 'based solely on "vague, conclusory, or palpably incredible" allegation or unsupported generalizations.'" Amos v. State of Minnesota, 849 F.2d 1070, 1072 (8th Cir.), cert. denied, 109 S.Ct. 159, 102 L.Ed.2d 130 (1988) (quoting Beavers v. Lockhart, 755 F.2d 657, 633 (8th Cir. 1985), additional citation omitted).

This Magistrate must find that the petitioner's allegation of coercion, bribery

and perjury are indeed speculative, inconcrete and palpably incredible. He does not point to any individual statement made by any witness as being particularly and specifically false. He contends that all of the witnesses met prior to initiating a criminal complaint and manufactured their story so as to have the petitioner "put away". The petitioner points to the following specific evidence supporting his claim:

(a) Mrs. Mitchell arrived in Spokane prior to the alleged acts that founded the first count (assault).

(b) Mrs. Mitchell stayed in Spokane at the Zickefooses' residence through the date of the trial.

(c) The Mitchells wound up with the custody of his children by Mrs. Mitchell (the first Mrs. Wallin).

(d) Mr. Mitchell later pled guilty to molesting the petitioner's daughter, Tracey Wallin.

The above points are accepted by this Magistrate as either established by the petitioner's submissions, or at the very least, verifiable. However, the conclusion that the petitioner draws there from is tenuous and speculative at best. The alleged criminal conduct underlying the second count (statutory rape) involved Mrs. Mitchell's son, Jesse Wallin, Jr., and predated both Sandra Wallin's telephone call to Mrs. Mitchell and Mrs. Mitchell's arrival in Spokane. Mrs. Zickefoose had known both the petitioner and his first wife, Mrs. Mitchell, for many years. Sandra Wallin after the petitioner's conviction, retained custody of her children by the petitioner; Mrs. Mitchell was legally granted custody (evidently in late 1981) of her three children by the petitioner.

The petitioner's rambling account of conspiracy, childtrading and poisoning is far less likely than the more obvious conclusions: Sandra Wallin was upset over the petitioner's forcing her to have sexual intercourse

with her thirteen year old stepson, and, resolving to escape from the petitioner, phoned Mrs. Mitchell, the mother of her three stepchildren. (At trial, Sandra Wallin was asked why she had not left the petitioner earlier. She testified to being afraid, and of having no place to take her "babies". The logical place for the elder three Wallin children was in the care of their mother, Mrs. Mitchell). Mrs. Mitchell came to Spokane in the interests of her children.[6] She stayed with long-time friends, the Zickefooses. Following the assault on January 28, the day Mrs. Mitchell arrived in Spokane, Sandra Wallin left the petitioner. Her doctor testified that he saw her on January 29, 1980, as a matter of some urgency.

[6]At trial, Mrs. Mitchell testified that she had come to Washington in order to attend a civil hearing regarding custody, and that this hearing was postponed. Transcript at 287.

He testified to Sandra's injuries.[7] Dr. Claypool gave Sandra a tranquilizer. Sandra went to the police on February 4, 1980. It may be inferred from other of the petitioner's submissions that Sandra was also staying with the Zickefooses. Sandra willingly gave the care of her three stepchildren over to their mother, Mrs. Mitchell. It cannot be said that either Sandra or Mrs. Mitchell had foreknowledge of Mr. Mitchell's later criminal conduct as to Tracey Wallin.

There is no substantial credible evidence from which perjury, conspiracy, or bribery can be inferred; and the testimony of the witness does not appear inconsistent or unreasonable. But even if such was the case, there is virtually nothing to suggest that the prosecutor knowingly presented the manufactured testimony before the trial court.

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[7] It is noted that the petitioner has not suggested that Dr. Claypool was one of the conspirators.

The petitioner points only to the "immunity" given to Sandra Wallin: The charging document and the arrest warrant issued for the petitioner named the petitioner as an accomplice to statutory rape. Nonetheless, Sandra Wallin was never charged as the principal in the crime. The petitioner obviously infers from this that Sandra cut a deal with the prosecutor; his failure to divulge the existence of this deal to the trial court suggests that the prosecutor was in on the whole conspiracy.

None of these conclusions logically follow from the given facts. Obviously, the theory of the prosecutor's case was that the petitioner coerced Sandra into having sexual intercourts with Jesse, Jr. The coercion relieved Sandra from any criminal culpability. As noted in RCW 9A.16.060(1):

> In any proseuction for a crime, it is a defense that: (a) The actor participated in the crime under compulsion by another who by threat or use of force created an apprehension in the mind of the actor that in case of refusal he or another would be liable to immediate . . . grievous bodily injury . . . .

To charge Sandra as the principal would have been entirely inconsistent with the prosecutor's position. There was no need to grant immunity from prosecution, and a clandestine immunity agreement cannot be logically inferred from the lack of charges filed against Sandra Wallin. And even in the highly unlikely case of negotiations for immunity from prosecution, there is nothing from which the existence of a full-fledged conspiracy between the witnesses and the prosecutor could be inferred.

The petitioner's story must be deemed speculative and incredible, and thus may be rejected without holding an evidentiary hearing thereon.

(4) Ineffective Assistance of Counsel

> To obtain refief for a claim of ineffective assistance of counsel on a habeas corpus review, the petitioner must demonstrate that his attorney "made errors that a reasonable competent attorney acting as a diligent and conscientious advocate would not have made, and petitioner mus also demonstrate prejudice."

Woratzek v. Ricketts, 820 F.2d 1450, 1453 (9th Cir. 1987). Moreover, to show prejudice,

the petitioner must demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland v. Washington, 466 U.S. at 694, 104 S.Ct. at 2068.

The petitioner's litany of defense errors is rather tangled, and difficult to parse analytically. It is interesting to note that the petitioner was granted permission to act as co-counsel for his own defense (see ground (d), below), and thus had the opportunity to correct his lawyer's "errors". As noted above, the petitioner charges that his lawyer (a) did not attempt to present evidence of the conspiracy and bribery of witnesses, (b) failed to produce witnesses who would have vindicated the petitioner, (c) failed to present evidence that the petitioner's wife poisoned and/or drugged the petitioner before, during and after the alleged crimes were committed, and

(d) forced the petitioner to represent himself. As a separate ground, the petitioner argues that his lawyer's failure to submit a "Statement of Appeal" deprived him of the opportunity to review the full transcript of all proceedings, and thus violated his due process rights.

An evidentiary hearing is unnecessary where the petitioner's allegation fail to demonstrate prejudice sufficient "to undermine confidence in the outcome." Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985). As noted in the section above, the petitioner has failed to present any evidence from which a reasonable inference could be drawn regarding a conspiracy between and bribery of witnesses. Any attempt on the part of the petitioner's lawyer to draw from the witnesses testimony to support the petitioner's outlandish theories would have been likely to backfire, depriving the defense of any remaining credibility with the jury.

The petitioner next charges that his attorney refused to produce certain alibi

witnesses and to cross-examine others regarding alibi evidence. In particular, the petitioner charges that his lawyer did not cross-examine the petitioner's brother and sister-in-law (Edward and Susan Wallin) about the whereabouts of Jesse, Jr., although the petitioner claims that they had Jesse, Jr. with them during the period in which Jesse, Jr. was alleged to have had intercourse with Sandra. However, Jesse Jr. himself corroborated the events alleged by Sandra; the petitioner has not included Jesse, Jr. among the conspirators. Further, with the petitioner acting as co-counsel, he himself could have asked about the location of Jesse, Jr. during the relevant period. He did not. There was no evidence or testimony in the record to indicate that the presence of Jesse, Jr. was ever in issue.

The petitioner also contends that his attorney refused to subpoena one "Clodia Gurham" whom he alleges spent the night of January 11-12 on the couch in the Wallin home, and thus would

have witnessed the events alleged had they actually happened. Nonetheless, the petitioner personally cross-examined Sandra, and never asked about the presence of Ms. Gurham. This Magistrate has been unable to find any reference in the trial transcript to such a person. The petitioner has failed to show that he was prejudiced by the lawyer's refusal to secure her presence at trial.

The petitioner asserts that his lawyer refused to secure witnesses who could testify to Sandra's poisoning/drugging the petitioner with valium and dilantin during the month of January, 1980. Yet the petitioner personally cross-examined Sandra, and made no mention of poisoning and/or drugging. It is clear from the record that the petitioner indeed suffered from a dilantin[10] overdoses during the month of January, 1980; the theory of the defense was that the petitioner was during the time in question not responsible for his acts. But in

[10]Prescribed for the petitioner for a seizure disorder.

that the petitioner himself had every opportunity to cross-examine on these matters, it cannot be said that the petitioner was prejudiced by his lawyer's inaction.

The petitioner's arguements regarding being "forced" to represent himself do not state a separate claim, but rather are a conclusion drawn by the petitioner because of his lawyer's "failure" to make a better case. However, the petitioner's current allegations have absolutely no support in the record, and there is no indication that trial would have gone any better had the petitioner's attorney attempted to proceed along the lines desired by the petitioner.

Last, the petitioner argues that he was deprived of due process by his lawyer's failure to submit a "Statement on Appeal". However, it is not clear exactly what the petitioner is referring to: Washington's Rules of Appellate Procedure provide for the filing of a "Civil Appeal Statement" in RAP 5.5 (1980), but this provision does not apply

in criminal trials. This Magistrate is unaware of any "Appeal Statement" requirement in securing a trial transcript; the Rules on Appellate Procedure make ample provision for the securing of trial transcripts (and other services) at public expense. RAP Title 15. The petitioner has not adequately shown either prejudice or due process deprivation regarding his lawyer's appellate activities.

(5) Jury Instructions

The petitioner charges that the trial judge issued an unconstitutional instruction (instruction No. 8) on the element of knowledge:

> A person knows or acts knowingly or with knowledge when:
>
> 1. He or she is aware of a fact facts or circumstances or result described by law as being a crime; or
> 2. He or she has information which would lead a reasonable person in the same situation to believe that facts exist which facts are described by law as being a crime.
>
> Acting knowingly or with knowledge also is established if a peson acts intentionally.

The petitioner correctly notes that this instruction was rejected by the Washington Supreme Court in State v. Shipp, 93 Wn.2d 510, 610 P.2d 1322 (1980), as potentially requiring a jury to presume "knowledge" when a defendant is in possession of facts from which a "reasonable person" would have concluded that an act was criminal, without evaluating the individual mental state of the accused.

> Before a federal court may overturn a state court conviction based on an incorrect or erroneous jury instruction, "it must be established not merely that the instruction is undesirable, erroneous, or even 'universally condemned,' but that it violated some right which was guaranteed to the defendant by the Fourteenth Amendment." Cupp v. Naughten, 414 U.S. 141, 146, 94 S.Ct. 396, 400, 38 L.Ed.2d 368 (1973). The erroneous jury instruction must have rendered the trial so fundamentally unfair as to have denied [the defendant] due process. Ahlswede v. Wolff, 720 F.2d 1108, 1111 (9th Cir. 1983) (per curiam), cert. denied, 469 U.S. 873, 105 S.Ct. 225, 83 L.Ed.2d 155 (1984).

McGuire v. Estele, 873 F.2d 1323, 1325 (9th Cir. 1989) (emphasis added).

It is clear that the jury believed that testimony of Sandra Wallin. Her testimony

described acts overtly and obviously intentional; this was not a case wherein the alleged criminal acts could have been construed as legal by a defendant of less that "reasonable" state-of-mind. Compare the offenses considered by the Washington Supreme Court in State v. Shipp, supra. Furthermore, the jury was instructed as to the petitioner's defense of insantiy at the time of the offense, which, if believed, would have relieved the petitioner of culpability regardless of the content of Instruction No. 8. Instruction 8 did not render the petitioner's trial fundamentally unfair; any error was essentially meaningless in the context of the petitioner's trial.

The petitioner also points out that there was no instruction regarding the "missind INTENT element". However, there was no error: the crimes of Second Degree Assault and Second Degree Statutory Rape contain no express element of intent. It is sufficient for Second Degree Assault the offense be

committed knowingly, RCW 9A.36.020(1)(b) (see state v. Adlington-Kelly, 95 Wn.2d 917, 631 P.2d 954 (1981); there is neither intent nor knowledge required for Second Degree Statutory Rape. State v. Abbott, 45 Wn.App. 330, 726 P.2d 988 (1986).

(6) Sentencing

The petitioner contends that Washington's Indeterminate Sentence Review Board ("ISRB") (a) unconstitutionally refused to apply Washington's Sentencing Reform Act (SRA), (b) failed to inform the petitioner of the factors it would rely upon in issuing its excessive sentence, (c) failed to preserve a transcript of the sentencing hearing, (d) miscomputed the petitioner's offender's score, and (e) did not provide sufficient notice of its intention to impose an excessive sentence. Almost as an afterthought, the petitioner also argues (f) that his "exceptional" minimum sentence is unconstitutionally vague.

The petitioner's claims evince

a profound misunderstanding of Washington's Sentencing Reform Act. With the enactment of the SRA, the Washington legislature attempted to overhaul the entire criminal sentencing structure. The SRA provided for the abolishment of the parole system and established a "determinate" sentence system. Under the old scheme, the trial court would establish a maximum sentence and recommend particular minimum sentence to the Board of Prison terms and paroles (Board). The Board would set a minimum term, generally the date (less good time) at which a prisoner was considered eligible for parole. Under the new scheme, the trying court establishes a determinate sentence (typically much less severe than the maximum possible sentences, and frequently even less severe that the minimum sentences contained in the earlier Board guidelines). Upon completion of a determinate sentence, less good time, the prisoner is released, in no way subject to parole supervision or other restrictions.

The SRA was drafted to apply prospectively only. RCW 9.9A.905 (1981) ("The sentences required under this chapter shall be prescribed in each sentence which occurs for a felony committed after June 30, 1984"); See also Mehorn v. Firestone Tire & Rubber Co., 788 F.2d 1496, 1504 (9th Cir. 1984))"A statute will not be given retroactive effect absent clear legislative intent.") Felons convicted of crimes committed before July 1, 1984 were therefore to continue under the preexisting parole system while the more recent felons served their determinate sentences and were released without parole supervision.

"There is no constitutional or inherent right of a convicted person to be conditionally release before the expiration of a valid sentence." Greeholtz v. Inmates of the Nebraska Penal and COrrectional Complex, 442 U.S. 1, 7, 99 S.Ct. 2100, 2103, 60 L.Ed.2d 688 (1979). A state may establish a parole system, but has no duty to do so. Id. Thus, there is no express federal liberty interest

can be created by a state by statute, Hewitt v. Helms, 459 U.S. 460, 103 S.Ct. 864, 74 L.Ed.2d 678 (1983), or by regulation, Olm v. Wakinekona, 461 U.S. 238, 249-50, 103 S.Ct. 864, 75 L.Ed.2d 813 (1983). Such a protected interest is created where statute or regulation substantially constrains the exercise of official descretion. Bergen v. Spaulding, 881 F.2d 719, 721 (9th CIr. 1989); Baumann v. Arizona Dept. of Corrections, 754 F.2d 841, 844 (9th CIr. 1985).

Washington has created no liberty interest in parole. In re Ayers, 105 Wn.2d 161, 164-165, 713 P.2d 88 (1986); Mayner v. Callahan, 873 F.2d 1300, 1301 (9th Cir. 1989). Nor has Washington created in favor of pre-SRA prisoners a liberty interest to a determinate-style SRA maximum sentence. Foster v. Washington State Board of Prison Terms and Paroles, 878 F.2d 1233 (9th Cir. 1989). The Ninth Circuit found no due process or equal protection problems from the continued co-existence of two sentencing systems. Id., at 1235.

The petitioner has absolutely no right to have his maximum term redetermined under the SRA.

Moreover, there is no unconstitutionality to the ISRB's continuation of the petitioner to his maximum sentence. While Bergen v. Spaulding, 881 F.2d 719 (9th Cir. 1989), guarantees that good-time credits cannot be denied without a hearing, the petitioner has had all the due process required under Bergen. See Respondent's Exhibit 3 (Parolability hearing held 10/18/88); the ISRB is expressly prohibited from paroling a prisoner (prior to the expiration of his maximum sentence, "unless in its opinion his rehabilitation has been complete and he is a fit subject for release." RCW 9.95.100 (emphasis added).

The remainder of the petitioner's sentencing claims have become moot, because they concerned the ISRB's determination of the petitioner's minimum sentence. The petitioner has served out his minimum sentence. Any unconstitutionality in the determination of his

minimum sentence has dissipated; he is constitutionally being held to the termination of his maximum sentence.

CONCLUSION

None of the petitioner's claims justify an evidentiary hearing. Despite the volume of the petitioner's pleadings, a careful review of all of the petitioner's documents fails to turn up any sustantial factual support for his habeas allegations. The petitioner overlooks the fact that once a criminal conviction is entered and withstands state appellate review, the burden is no longer on the state to defend and justify the conviction. The burden must rest upon a habeas petitioner; he must present adequate and substantial grounds to suggest that a conviction was unjustly and unconstitutionally entered in order to secure an indepth evidentiary review. The petitioner's claims appear to be either illusory and insubstantial, or without justification under the law. Accordingly, this Magistrate must recommend that the Motion

of the respondent to Dismiss be granted, the petitioner's Motion for Summary Judgment as to Ground I be denied, and this Petition dismissed.

DATED this 16 day of Aug, 1990.

/s/
UNITED STATES MAGISTRATE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

JESSE D. WALLIN, SR., Petitioner,	No. C88-479TB
vs.	
INDETERMINATE SENTENCE REVIEW BOARD, et al., Respondent.	O R D E R

Petitioner has filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, and the matter has been referred to the United States Magistrate who has made a Report and Recommendation in this matter.

After reviewing the file herein and the Report and Recommendation of the Magistrate, it is hereby

ORDERED:

1. The Report and Recommendation of the Magistrate is hereby approved and adopted by this court.

2. Petitioner's Motion for Summary

Judgement as to Ground I is denied.

3. Respondent's Motion to Dismiss is granted and this petition dismissed.

4. The Clerk of the Court shall direct copies of this Order to counsel for petitioner (if any, otherwise to petitioner) and to counsel of record for respondent.

DATED this 11th day of Oct, 1990.

/s/
U.S. DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

JESSE D. WALLIN SR., Petitioner, vs. INDETERMINATE SENTENCE REVIEW BOARD: DEPT. OF CORRECTIONS, et al., Respondents.	)	No. C88-479TB ORDER DENYING MOTION TO RECONSIDER DISMISSAL

THIS MATTER comes before the court on the motion of Petitioner Jesse D. Wallin, Sr. for reconsideration of the court's order approving and adopting the Report and Recommendation of the Magistrate, denying Petitioner's Motion for Summary Judgment as to Ground I, granting the Respondent's Motion to Dismiss, and dismissing the Petition for Writ of Habeas Corpus.

The court has considered the motion and the documents filed in support, and hereby

ORDERS that Petitioner's Motion to Reconsider Dismissal is DENIED.

The Clerk of the Court is instructed to send uncertified copies of this Order to all counsel of record.

DATED THIS 10 day of December, 1990.

/s/
ROBERT J. BRYAN
United States District Judge

APPENDIX D

U.S. District Court
U.S. District Court - Western Washington
(Tacoma)

CIVIL DOCKET FOR CASE #: 88-CV-479

Jesse Wallin v. Indeterminate Board
Assigned to: Judge Robert J. Bryan Filed 9-23-88
Referred to: Judge Robert J. Bryan

Demand: $ 0,000 Nature of Suit: 540
Lead Docket: None Jurisdiction: Federal
Dkt# in other court: None Question

Cause: 28:1331 Fed. Question

JESSE D WALLIN, SR.
Plaintiff

Jesse D. Wallin, Sr.
#287287
[COR LD NTC]
WSP
P.O. Box 520
Walla Walla, WA 99362

v.

DEPARTMENT OF CORRECTIONS
Defendant

Aaron Kazuo Owada
[term 10/02/90]
586-1445
[COR LD NTC]
ATTORNEY GENERAL'S OFFICE
Corrections Division
7th Fl. Hwy/Lic Bldg.
FZ-11
Olympia, WA 98504-8076
586-1445

INDETERMINATE SENTENCE REVIEW BOARD

Defendant

Aaron Kazuo Owada
[term 10/02/90]
(See above)
[COR LD NTC]
Thornton Wilson
(See above)
[COR LD NTC]

Date	NR.	WALLIN PROCEEDINGS C88-479
1988		
09-23	**	WRIT OF MANDAMAS
	**	APPLICATION for IFP
10-03	1	ORDER (RJB) P's mtn for IFP is granted, clerk to make service, mat is ref to Mag. c to c, MAG. ENT 10-5-88
	2	WRIT
10-07	3	MTN for IFP
		SERVICE to Marshal
10-24	4	MOTION -by P for production of documt; ntd 11-18-88
10-28	5	ORDER (FDB) consid of mtn shall be deferred until a proof of svc has been filed; clerk shll strike mtn & shall renote after proof of svc/ c/c ent & mld 10-31-88
11-07	6	LETTER to Ct to adv of aff of svc of above pleadings; clerk to renote to 11-25-88
	7	
	8	AFF of svc
11-04*	9	NOTICE of appear by D atty; AFF of svc
11-18	10	MOTION -by P for ord & ord to S/C re tempory matters; ntd 12-9-88
	11	AFF of svc
11-29	12	MARSHAL return on Writ of Mandamus on 11-4-88 to Indeter minate Sent. Review Board
12-2	13	PREACIPE (cover letter) to subst pages of s/c ord mtn #10; AFF of svc
12-12	13A	ORDER (FDB) Pet mtn for appt of cnsl is DENIED c to c ent 12/13/88
12-15	14	MOTION -by D to dism; nn cnsl cld
	15	MEMO in supp of by D fo mtn to dism
	16	AFF of svc

	17	RESPONSE BY D to P mtn for restr ord; attp of cnsl & prod of doc
12-16	18	MOTION - by D to dism; ntd 1-6-88 (#14) AFF of svc
12-16	19	ORDER (FDB) D to S/C w/i 30 days why P mtn for Rest ord should not be granted; clerk to renote; c/c ent & mld 12-16-88
12-27	20	RELEVENT iss, & aff of facts by P
	21	NOTICE of iss; ntd 1-13-89
	22	AFF of svc
	23	RESPONSE by P to D mtn to dism
	24	AFF of svc
12-27	25	RESPONSE by P to D mtn to dism, and P mtn to dism respondent's mtn
1989		
01-11	26	REPORT & REC (FDB); recommends respondent's mtn to dis be granted.
	27	LETTER
	**	ORDER
01-12	28	MOTION -by P & not of mtn re transcripts; ntd 2-3-89
	29	NOTICE of mtn by P; ntd 2-3-89
	30	AFF of svc
01-13	31	MOTION -by P to add addit D w/mtn to amd Writ of H/C
	32	NOTICE of mtn; ntd 1-27-89; changed to 2-3-89
	33	AFF of svc
01-20	34	MOTION by plaintiff to amend H/C noted for 2/10/89 (pn) [Entry date 1/24/89]
01-20	35	AFFIDAVIT of service (pn) [Entry date 1/24/89]
01-23	36	RESPONSE bydefendant to motion to amend H/C & to add addit D' [34-1] (pn)[Entry date 1/30/89]
01-26	37	MOTION by plaintiff for re-consideration noted for 2/10/89 (pn) [Entry date 1/30/89]

1989

01-26	38	AFFIDAVIT of Jesse D. Wallin Sr regarding motion for reconsideration [37-1] (pn) [Entry date 1/30/89]
01-26	39	AFFIDAVIT of service (pn) [Entry date 1/30/89]
01-26	40	MOTION by plaintiff for summary judgment as to #1 of Writ noted for 2/17/89 (pn) [Entry date 1/30/89]
01-26	41	AFFIDAVIT of service (pn) [Entry date 1/30/89]
02-01	42	RESPONSE by plaintiff to D response of 1-20-89 (pn) [Entry date 2/2/89]
02-01	43	AFFIDAVIT of service (pn) [Entry date 2/2/89]
02-03	44	MOTION by plaintiff for entry of default as to Respondent' nt for 2/24/89 (pn)
02-08	45	LETTER from plaintiff to Tana Wood re term & release (pn)
02-16	46	MOTION by plaintiff to extend time noted for 3/10/89 a/ afdt of svc (pn)
03-20	47	BRIEF filed by plaintiff in support of writ of H/C; w/ afdt of svc (pn)
04-05	48	LETTER by Court to adv P of the return of Interrogatories & Marshal service forms; we are not responsible for service (pn) [Entry date 4/9/89]
04-10	49	MOTION by plaintiff Jesse D. Wallin Sr for appointment of counsel noted for 4/28/89 (bb) [Entry date 4/12/89]
04-10	50	AFFIDAVIT of mailing of regarding motion for appointment of counsel [49-1](bb) [Entry date 4/12/89]

1989

05-03	51	ORDER BY Judge Robert J. Bryan; R&R is renoted for recons in 30 days frm enty of this order; P' mt to ament is renoted for reconsideration in 30 days; P may submit a proposed amd Complaint w/i 30 days of entry of this order; P' mtn for SJ on ground one of his writ is denite; P' mtn for ext of time to submit a new brief on his mtn is denied;
05-08	52	LETTER from plaintiff re release from prison (pn) [Entry date 5/9/89]
05-19	53	MOTION by plaintiff to amend H/C noted for 6/9/89; afdt of ml (pn) [Entry date 5/22/89]
05-19	--	PROPOSED Writ of H/C (pn) [Entry date 5/22/89]
05-19	54	MOTION by plaintiff to exceed page limitation noted for 6/9/89; afdt of svc (pn) [Entry date 5/22/89]
06-14	55	MOTION by plaintiff to w/d mtn for cont; mtn to proceed w/ H/C noted for 6/30/89; afdt of svc (pn) [Entry date 6/15/89]
06-14	56	MOTION by plaintiff for order & certification of complete transcript noted for 6/30/89; afdt of ml (pn) [Entry date 6/15/89]
06-26	57	ORDER by Magistrate Franklin D Burgess granting motion to amend H/C [53.1] denying motion for appointment of counsel [49-1]; show cause ddl set 7/28/89 for petitioner why amended petition should not be dismissed, (cc: all counsel) (pn) [Entry date 6/27/89]

1989		
06-26	58	AMENDED PETITIONER FOR WRIT OF HABEAS CORPUS (pn) [Entry date 6/27/89]
07-10	59	RESPONSE by plaintiff to ruling dated 6/26/89 to SC order; afdt of svc (pn) [Entry date 7/11/89]
07-11	60	LETTER from plaintiff re Exhibit 13 (pn)
07-14	61	MOTION by plaintiff to supplement [61-1] response to ruling dated 6/26/89 order to S/C noted for 8/4/8 (pn)
07-14	62	SUPPLEMENTAL RESPONSE by plaintiff to order to S/C (pn)
07-20	63	ORDER by Magistrate Franklin D. Burgess; show cause ddl submit documentation by D' 8/25/89 re order #63 (cc: all counsel) (pn) [Entry date 7/21/89]
08-14	64	RESPONSE by defendant to court order dated 7/20/89; afdt of svc (pn)
08-25	65	RESPONSE by plaintiff re order dated 7/20/89; afdt of mail(pn)
10-26	66	ORDER TO SHOW CAUSE: by Magistrate Franklin D. Burgess; D to S/C w/i 30 days why Habeas relief should not be granted to the petitioner (cc all counsel) (pn)
10-27	67	MOTION by plaintiff for restraining order & S/C noted for 11/17/89 (pn) [Entry date 10/31/89]
11-13	68	MOTION by plaintiff for reconsideration & for cnsl to supply transcript noted for 12/1/8 (pn) [Ent date 11/15/89]

1989		
11-13	69	AMENDED BRIEF filed by plaintiff regarding motion for reconsideration & for cnsl to supply transcript [68-1] (pn) [Entry date 11/15/89]
11-29	70	SUPPLEMENTAL RESPONSE by defendant to ineffective assistance of cnsl claims; afdt of svc (pn)
12-13	71	NOTICE by plaintiff that the following is noted for 12/29/89 the suppl response to Respondent's suppl response to ineffective asst of cnsl claims re SJ mtn (pn) [Entry date 12/15/89]
12-14	72	RESPONSE by plaintiff to Respondents' suppl resp to ineffective assist of cnsl claims (pn) [Entry date 12/15/89
12-20	73	LETTER from plaintiff to advise the packet of mtn for cnsl etc was sent to atty general instead; clerk had made copies & advised P'previously (pn)
1990		
01-02	74	MOTION by plaintiff to amend supplemental H/C noted for 1/19/90 (pn)
01-02	--	PROPOSED Supplemental writ of H/C (pn)
01-02	75	MOTION by plaintiff for summary judgment in ref to Ground noted for 1/26/89 (pn)
01-08	76	MOTION by plaintiff to continue noted for 1/26/90; afdt of service (pn)
01-08	77	ORDER TO SHOW CAUSE: by Magistrate; D' to C/C w/i 30 days why P' mtn to reconsider dismissal of ground not be granted D' w/i 30 days submit further briefing on merits of P' allegations pur Rule 5 (cc: all counsel) (pn) [Entry 1/9/90]

1990		
02-07	78	SUPPLEMENTAL RESPONSE by defendant on H/C of Jesse Wallin (pn)
02-08	79	TRANSCRIPT FILED by defendant pursuant to letter of 2/5/90 from Superior Ct for Spokane County (pn)
08-20	80	Report and Recommendation regarding mtn for SJ as to Ground I is denied & mtn to dismiss; finding the motion to supplemental H/C [74-1] moot., finding the motion for reconsideration & for cnsl to supply transcript [68-1] moot., finding the motion for restraining order & S/C [67-1] moot., finding the motion to supplement [61-1] moot., finding the motion for order & Certification of complete transcript [56-1] moot., finding the motion to w/d for cont; mtn to proceed w/ H/C [55-1] moot., finding the motion to exceed page limitation [54-1] moot. by Magistrate Frandlin D. Burgess assigned to Judge Robert J. Bryan noted for 9/14/90 (cc: all counsel)(pn)
08-20	--	LODGED ORDER: re: report & recommendation motion Report and Recommendation regarding mtn for SJ as to Ground I is denied & mtn to dismiss; finding the motion to continue [76-1] moot finding the motion to amend supplemental H/C [74-1] moot., finding the motion for reconsideration & for cnsl to supply transcript [68-1] moot finding the motion for restraining order & S/C [67-1] moot, finding the motion to supplement [61-1] response to ruling

continued		dated 6/26/89 order to S/C [61-1] moot, finding the motion for order & certification of complete transcript [56-1] moot finding the motion w/d mtn for cont; mtn to proceed w/ H/c; [55-1] moot., finding the motion to exceed page limitation [54-1] moot. (pn)
10-02	81	SUBSTITUTION OF COUNSEL on behalf of Indeterminate Sent, Department of Correc is Thornton Wilson; Terminating attorney Aaron Kazuo Owada (pn)
10-12	82	ORDER by Judge Robert J. Bryan granting Report and Recommend-ation regarding mtn for SJ as to Ground I is denied & Respondent's mtn to dismiss is Granted & this petition is dismissed. (cc: all counsel) (pn) [Entry date 10/15/90]
10-15	83	JUDGMENT: R&R approved & adopted; P' mtn for SJ as to Ground I is denied; Resp' mtn to dismiss is granted & this petition is dismissed (cc: all counsel) (pn)
11-09	84	MOTION by plaintiff for recon-sideration of dismissal noted for 11/30/90 (pn)
12-10	85	ORDER for Judge Robert J. Bryan denying motion for reconsider-ation of dismissal [84-1] (cc: all counsel) (pn)
1991		
01-02	86	NOTICE OF APPEAL by plaintiff from Dist. Court decision [85-1] denying mtn to recon-sider dismissal (cc: CCA, RJB, all counsel) (mw) [Entry date 01/09]

1991		
01-02	--	NO APPEAL FEE RECEIVED: appellant granted IFP in USDC 10/05/88 (mw) [entry date 1/9/91]
01-09	--	APPEAL NOTIFICATION packet sent to CCA (cc: cnsl) (mw)
01-09	--	CERTIFICATE OF RECORD transmitted to USCA-no transcripts (cc: all counsel)(mw)

Docket as of January 9, 1991 12:09 pm

APPENDIX E

IN THE SUPERIOR COURT OF WASHINGTON
COUNTY OF SPOKANE

SANDRA LEE GOURDIN, Petitioner, vs. JESSE D. WALLIN, SR., Respondent.	No. 90-200488-5 SWORN AFFIDAVIT OF; JESSE D. WALLIN JR.

STATE OF WASHINGTON)
)SS:
COUNTY OF SPOKANE)

I, Jesse D. Wallin, Jr., being first duly sworn upon Oath, under the penaltys of perjury, and of my own free will, without force or threat make the following statements, and hereby recant testimony that I was Coached, drilled, intimidated into giving against my father Mr. Jesse D. Wallin, Sr., in cause No.: 80-1-00138-9, By Deputy Prosecuting Attorney PETER S. SCHWEDA, who coached, drilled, and told me what to testify to at said criminal trial, and, that, said testimony was and is false.

That the true facts are as follows:

(1) That, on January 4,5,6, 1980. I was not in the Wallin home at E 18921 Sprague, Greenackers Washington. That, I stayed at Edward H. and Sue Wallin's home at 2121 W. Fairview, Spokane, WA., the entire weekend, and was returned to E. 18921 Sprague, Greenackers, Wa., on Sunday January 6, 1980 at Approximately 4:30 pm. and was returned to the Nebeker Boy's Home.

(2) That on January 11,12,13,1980 I was not in the Wallin Home at E. 18921 Sprague, Greenackers, WA., that, on this date I was at Edward H. and Sue Wallin's home for the entire weekend, I left my home at E. 18921 Sprague, Greenackers, WA. and taken to Edward R. and Sue Wallin's home at approximatley 5:00 om., Friday January 11, 1980, and there remained until Sunday January 13,1980, and was returned to my home at E. 18921 Sprague, Greenackers, WA., and was then returned to the Neberker Boy's home.

(3) That at no time was I ever forced to engage in sexual intercourse with my stepmother Sandra L. Wallin, Gourdin. Alleged committed on january 11,12,13,1980.

(4) That, at no time on January 11,12,13,1980, was Sandra L. Wallin, Gourdin ever forced to engage in sexual intercourse with me. And that I have no knowledge of such acts other then what I was told to say at the time prior to the criminal trial

(5) That Charles and Mary J. Zickefoose,also told me that I should give this testimony which is false against my Father, and assisted in telling me what to say and give, ingiving testimony.

I JESSE D. WALLIN, JR., being first duly sworn, deposes and says that he has read the foregoing Affidavit subscribed by him and

and knows the contents thereof, and that the same is true of his own knowledge, except those statements made at time of the Criminal Trial, above stated herein.

/s/
Jesse D. Wallin, Jr.

SUBSCRIBED and SWORN to before me this 31 day of May, 1990.

/s/
NOTARY PUBLIC in and for the State of Washington, residing at Spokane

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

JESSE D. WALLIN, SR.,)
Petitioner,) Cause No.: C-88-479-TB
vs.)
INDETERMINATE SENTENCE REVEIW BOARD, et al.,)
Respondents.)

STATE OF WASHINGTON)
)SS: AFFIDAVIT.
COUNTY OF SPOKANE)

I Dorothy L. McCracken, being first duly sworn upon oath, am over eighteen years of age, am competent to be a witness herein, make the following statements' without force, threats, or intimidation of any kind, and state as follows:

(1) That on December 1979, my Sister Mary J. Zickefoose, phoned me at my home at Summer, Washington, and I also talk to Sandra L. Wallin (Gourdin) and was told at this time, Sandra L. and Jesse D. Wallin, Sr., were going to separate.

(2) That on December 1979, during said same phone call, Both Mary J. Zickefoose and Sandra L. Wallin (Gourdin) alleged and stated that Jesse D. Wallin Sr., had forced Sandra L. Wallin (Gourdin), to ingage in sexual intercourse with Jesse D. Wallin Jr. That this was the reasons for the separation.

(3) That I have read the trial Records and have made note that, the alleged sexual intercourse between Sandra L. Wallin (Gourdin),and Jesse Jr., is alleged to have been committed on the 11th,12th, and 13th of January 1980, and that this clearly shows a preplan to give at time of said criminal trial, in that, the alligations were made prior to the dates indicated in record.

(4) That my Children Sheryl, Edie, and Burton Funk, were staying the weekend at E. 18921 Sprague, Greenackers, Washington at the Wallin home, That i questioned my children about the alleged incidence claimed by Sandra L. Wallin (Gourdin) and Mary J. Zickefoose, and my children have told me that nothing like is being alleged against Jesse D. Wallin, Sr. was ever committed, and that nothing happened between Sandra L. Wallin (Gourdin) and Jesse Jr

(5) That, Jesse D. Wallin, Jr., was not in the Wallin home on January 11, 12,13,1980. And that Donald L. Funk, my Exhusband had Adam J. Wallin for the weekend at his home on the indicated dates.

(6) That it has also been brought to my attention that a woman named Clodia Moberg D. Who went by the name of Gurham at that time, stayed at the Wallin home with her two children who are witnesses hereto, that, no sexual abuse took place on January 11,12,13,1980. And that Shee Clodia, sleep on the couch in the living room, where the alleged sexual acts' are being claimed to have been committed. And now refusses to come forward to state the truth.

(7) That Kathleen M. Mitchell (Kinkel) also talk with me over the phone from the Zickefoose residence, and told me of having sexual Problems with Jesse Sr., and said that she was going to give testimony against him in return she would get the Wallin Children Tracey and Adam J. Wallin, and that she did not want Jesse Jr., the oldest boy child.

(8) That, I was also informed that, Kathleen M. Mitchell (Kinkel) while talking to her, told me that Sandra L. Wallin) (Gourdin) had phoned her and made a agreement for the Wallin Children in December 1979, to give testimony alleging sexual abusses and assaults' so that she Kathleen would get the Wallin children. I further note: that said agreement to give said testimony of Rape and assault were made prior to the dates stated in the criminal charges 11,12,13,1980.

(9) That, Charls F. Zickefoose & Mary J. Zickefoose were very disruptive force in my Family's lives, they tryed to have my Mother's children taken from her and also in 1976 Charls F. Zickefoosw attempted to force me into having sex with him right after birth of my third child and I was bed ridden. That charls F. Zickefoose, was not my Husband at the time.

(10) That, Mary J. Zickefoose informed me in February 1980, that She was not permitted to go out with Sandra L. Wallin(Gourdin) after having told her husband Charls F. Zickefoose that Sandra L. Gourdin wanted Mary jean Zickefoose to go to the Red Lians End with two colored Men to ingage and have a three-some sexual intercours.

That the above statements are true and correct to the bects of my knowledge.

/s/
Dorothy L. McCracken

SUBSCRIBED and SWORN to before me this 17th day of September, 1990.

/s/
NOTARY PUBLIC

APPENDIX F

Amendment XIV to the U.S. Constitution

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.